It was also submitted by Mr. Rajasingam that the judge should have exercised his discretion by passing a life instead of a death sentence since the offence was committed before the mandatory death penalty was imposed by law.

Looking at his grounds of decision, we find that the judge has exercised his discretion judicially and we do not think it is right for us to interfere. Accordingly, we also confirm the sentence imposed by the learned judge.

Appeal dismissed.

Solicitors: *Rajasingam & Co.*

M. RATNAVALE v. S. LOURDENADIN
M. MAHADEVAN v. S. LOURDENADIN

[S.C. (Abdul Hamid C.J. (Malaya), Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) 21 & 25 April & 4 June 1988]

[Kuala Lumpur – Supreme Court Civil Appeal Nos. 294 and 275 of 1985]

Land Law – Contract for sale of land – Repudiation of contract – Whether valid – Claim of specific performance – Defence of laches – Delay in prosecuting claims – Delay in lodging caveat on the land – Whether allegations of fraud or misrepresentation had been proved – Fraud not proved beyond reasonable doubt – Plaintiff calling defendant as witness – National Land Code 1965, s. 340(2)(a).

Civil Procedure – Trial – Plaintiff calling defendant as a witness – Discretion of court.

The first appellant, M. Ratnavale, was the registered proprietor of a piece of land in Kuala Lumpur. The first appellant and the respondent entered into an agreement for the sale and purchase of the land at the price of $93,000 free from all encumbrances. It was provided in the agreement that the sale of land shall be subject to the vendor obtaining a valid and registrable discharge of the charge of the land, which had been charged to one K. Sinnathamby, since deceased, and also subject to the Ruler-in-Council granting to the purchaser an extension of time to erect a building on the land. There was a delay in the completion of the sale and eventually the first appellant terminated the agreement and entered into a sale and purchase agreement of the land with the second appellant, Dr. M. Mahadevan, who was one of the executors of the estate of the first appellant's husband, who had died in the meanwhile. The second appellant was registered as the proprietor of the land.

The respondent, as plaintiff in the court below, alleged conspiracy to defraud both against the first and second appellants. The gist of the particulars of the statement of claim were summarized as follows:

(a) falsely and fraudulently representing to the Registrar of Titles that the issue document of title was lost, thereby *inducing the Registrar to issue a continuation title*;

(b) falsely and fraudulently representing to the Registrar that the personal representatives of the estate of the chargee could not be located, thereby *inducing the Registrar to cancel the memorial relating to the said charge* on the registry document of title and thereafter to discharge the said charge on 5 December 1973;

(c) falsely and fraudulently representing to the Registrar that the issue document of title was lost, thereby *inducing him to dispense with the production of the said title when registering the transfer* from Ratnavale to Mahadevan on 13 March 1974;

(d) presenting the transfer from Ratnavale to Mahadevan for registration on 13 March 1974 with the intention to defraud Lourdenadin, such presentation being *made after they acquired knowledge that the Ruler-in-Council had extended the time for construction on the land*;

The learned trial judge summarized the issues before her on the merits as follows:

(i) whether the repudiation by the first appellant of the contract was valid;

(ii) if it was not valid, whether specific performance should be granted to the respondent;

(iii) whether defence of laches applied to prevent the granting of specific performance;

(iv) whether the allegation of fraud or misrepresentation have been proved; and

(v) what are the proper reliefs to be granted in the event the plaintiff succeeds against both defendants.

Held: (1) the repudiation of the contract by the first appellant was contrary to the terms she had agreed to. The learned judge was therefore correct in holding that the purported termination of the first agreement by the first appellant was bad;

(2) under the circumstances, the case is not a fit and proper one for the grant of specific performance. The respondent in fact agreed to vary the terms of the first agreement but the variations never took effect because they were not acceptable to the first appellant. The respondent had not shown reasonable diligence in prosecuting her claims. There was the unexplained delay of 14 months in instituting proceedings after her interest was threatened and a further unexplained delay of five years before lodging a caveat on the land to protect her interest. The delay in instituting proceedings against the second appellant was even worse;

(3) the court was not satisfied that fraud under section 340(2)(a) of the National Land Code has been proved beyond reasonable doubt by reference to any of the particulars set out in the amended statement of claim. Suspi-

cion, however grave, is not proof for the purpose of a proceeding under the said provision of the National Land Code;

(4) there is no legal prohibition against a plaintiff calling a defendant to be his witness. The position in law is that the matter is left to the discretion of the trial judge according to the circumstances of the case. As a matter of practice this is seldom done for the simple reason that when the defendant is called as a plaintiff's witness, his evidence is to be treated as the evidence of the plaintiff. Hence the plaintiff runs a risk every time he elects to take such a course;

(5) the appeal by the second appellant is allowed and the orders made by the learned judge in respect of the second appellant are set aside. The appeal by the first appellant is allowed to the extent that the order for specific performance granted by the learned judge is set aside. The order as to damages is affirmed. The order of the learned judge dismissing the counterclaims of the first and second appellant is affirmed.

Cases referred to:

(1) *Jasbir Kaur & Anor.* v. *Tharumber Singh* [1974] 1 M.L.J. 224 (cited).
(2) *Assets Co. Ltd.* v. *Mere Roihi* [1905] A.C. 176 (cited).
(3) *Lindsay Petroleum Co.* v. *Hurd* [1874] L.R. 5 P.C. 221 (consd).
(4) *Emile Erlanger & Ors.* v. *New Sombrero Phosphate Co. & Ors.* (1878) 3 App. Cas. 1218 (refd).
(5) *Price* v. *Manning* (1889) 42 Ch. 372 (refd).
(6) *Barker* v. *Furlong* [1891] 2 Ch. 172 (refd).
(7) *Hughes* v. *Hill* (1937) 5 A.S.R. 285 (consd).
(8) *Saminathan* v. *Pappa* [1981] 1 M.L.J. 121 (folld).
(9) *Chellapah Sethupathy* v. *Aziz Beg & Ors.* 3 M.C. 85 (cited).
(10) *Yorkshire Provident Life Assurance Co.* v. *Gilbert & Rivington* [1895] 2 Q.B. 148 (cited).
(11) *Abdool Hoosein* v. *Turner* L.R. 14 I.A. 111 (cited).

SUPREME COURT.

R.R. Chelliah (*R. Arunachalam* and *C.P. Mahendran* with him) for the appellant in S.C.C.A. 294/1985 (first appellant).

Raja Abdul Aziz and *G. Sri Ram* for the appellant in S.C.C.A. 275/1985 (second appellant).

T. Thomas (*Ambiga Sreenevasan (Miss)* with him) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the judgment of the court): The first appellant (M. Ratnavale nee Annalakshmi d/o Vattivelu) and the respondent had known each other since 1956. On 13 March 1967, the first appellant became the registered proprietor of land known as Lot 9987 held under Grant No. 15434 in the Mukim of Batu, Lorong Kenny Bahagia in Kuala Lumpur ("the land"). On 2 November 1967, the first appellant created a charge over the land in favour of one K. Sinnathamby, since deceased. The second appellant (Dr. M. Mahadevan s/o Mahalingam) was the brother-in-law of the first appellant. The first appellant's husband passed away on 9 April 1973. The second appellant became one of the executors of the estate of the first appellant's husband some time in September 1973.

The respondent, as plaintiff in the court below, alleged conspiracy to defraud against both the first and second appellants. Paragraph 13 of the re-amended statement of claim sets out the particulars of the alleged fraud:

"13.(a) knowing that there was a written agreement for sale of the said land to the plaintiff and knowing that the issue document of title had been delivered to and was in the possession of the plaintiff's solicitors for the purpose of obtaining for the first defendant an extension of the time limited by the special conditions of title within which a building must be erected on the said land, the first and second defendants, with intent to defraud the plaintiff, falsely and fraudulently represented to the Registrar of Titles Wilayah Persekutuan that the issue document of title to the said land had been lost and thereby induced the said Registrar to issue a document of title in continuation in respect of the said land being Grant No. 17;

(b) knowing that a firm of solicitors was acting for the representatives of the estate of the deceased chargee of the said land, one Sinnathamby, and knowing that the representatives of the estate could be contacted through the said solicitors and that the charge could be discharged through the said solicitors, the first and second defendants, with intend to defraud the plaintiff, falsely and fraudulently represented to the Registrar of Titles Wilayah Persekutuan that the representatives of the estate of the chargee could not be located and thereby induced the said Registrar to cancel the memorial relating to the said charge on the Registry document of title to the said land and to discharge the charge on 5 December 1973;

(c) knowing that there was a written agreement for sale of the said land to the plaintiff and knowing that the issue of document of title had been delivered to and was in the possession of the plaintiff's solicitors for the purpose of obtaining for the first defendant an extension of the time limited by the special conditions of title within which a building must be erected on the said land, the first and second defendants, with intent to defraud the plaintiff, induced the Registrar of Titles to dispense with the production of the issue document of title to the said land and induced him to register a transfer of the said land from the first defendant to the second defendant on 13 March 1974 by falsely and fraudulently representing to the said Registrar that the issue document of title to the said land had been lost;

(d) knowing that there was a written agreement for sale of the said land to the plaintiff which was to be completed within 14 days of the Ruler-in-Council granting an extension of the time within which a building must be erected on the said land, the first and second defendants, with intend to defraud the plaintiff, executed and completed registration of a transfer of the said land from the first defendant to the second defendant on the same day as the first defendant was informed that the Ruler-in-Council had granted the extension."

Briefly, the relevant background facts are as follows. On 14 July 1972, the first appellant and the respondent through their respective solicitors negotiated for the sale and purchase of the land and entered into a sale and purchase agrement ("the first agreement"). It was agreed that the respondent would purchase the land at a price of $93,000 free from all encumbrances.

The title of the land carried a condition that a building must be erected on the land within a prescribed time. On the date of the execution of the first agreement, the period prescribed had expired.

On the date of the execution of the first agreement, $9,300 was paid by the respondent to the first appellant as deposit and to account of the purchase price. The balance of the purchase price was to be paid on October 1972 *or* within 14 days of the Ruler-in-Council granting an extension of time within which to erect a building on the land.

Clause 4 of the first agreement provided that the sale of the land shall be subject to the vendor obtaining a valid and registrable discharge of the charge and also subject to the Ruler-in-Council granting to the purchaser an extension of time to erect a building on the land. Clauses 8 and 9 provided for the payment of $9,300 as liquidated ascertained damages for breach of contract by either the purchaser or the vendor.

On the same date that the first agreement was executed, the solicitors for the first appellant, M/s Jayadeva & Zahir, wrote to the solicitors of the respondent, M/s Ng Ek Teong & Partners, stating that the first appellant had authorized the latter to act on her behalf to apply to the Ruler-in-Council to extend the time to erect a building on the land. On 2 October 1972, M/s Jayadeva & Zahir sent to M/s Ng Ek Teong & Partners the title deed of the land to enable them to apply to the Ruler-in-Council and vary the condition.

At that time the first respondent was in financial difficulties and quit rents and other dues of the land had been in arrears for several years and it was said that the land itself was about to be forfeited. Her husband was ill with brain tumour and was in and out of hospital. Negotiations for the sale of the land took place when her husband was in the General Hospital. Creditors were also pressing for repayment of loans.

Three or four months after the execution of the first agreement, the first appellant enquired about the progress of the application to the Ruler-in-Council and also enquired when the balance of the purchase price was expected to be paid. That letter was written on 15 November 1972. On 2 February 1973, M/s Jayadeva & Zahir wrote another letter to M/s Ng Ek Teong & Partners complaining that seven months had passed since the first agreement and that the first appellant was hard pressed to settle outstanding accounts of creditors. She enquired again of the progress of the application to the Ruler-in-Council. That letter also stated that if it was thought that the approval could not be obtained early the first appellant requested for an additional payment of two-thirds of the purchase price to relieve her of hardship. There was no reply to either of these letters.

Then on 23 February 1973, M/s Jayadeva & Zahir again wrote to M/s Ng Ek Teong & Partners asking for a further sum of $10,000 to account for the purchase price. This was replied on 22 March 1973 enclosing a cheque for the sum of $9,300. The cheque was, however, returned vide solicitor's letter as the first appellant did not want to accept the sum of $9,300.

Nothing was heard about the application by M/s Ng Ek Teong & Partners to the Ruler-in-Council until the letter from the Land Office, Kuala Lumpur dated 6 April 1973 to the effect that the registered owner of the land should make the application before action could be taken on the matter. On 25 May 1973, M/s Jayadeva & Zahir received a letter from M/s Ng Ek Teong & Partners forwarding an application to the Ruler-in-Council for signature of the first appellant. On the same date (25 May 1973), another letter was received by M/s Jayadeva & Zahir from M/s Ng Ek Teong & Partners enclosing a cheque for $9,300 which had been returned earlier. These letters were acknowledged by M/s Jayadeva & Zahir returning the cheque for $9,300 stating that their appellant did not want any part-payment. The letter also gave notice to the respondent to complete the contract within one month from that date. The same letter enclosed the application for extension to the Ruler-in-Council duly signed by the first appellant. From the tone of this letter, it can be inferred that the first appellant was still in financial difficulties. It also suggested (quite incorrectly) that the application for extension of time to the Ruler-in-Council was only a formal matter and that even without the approval of the extension the land could be conveyed.

The notice given by the first appellant was replied in the letter of M/s Ng Ek Teong & Partners

to M/s Jayadeva & Zahir dated 9 July 1973 expressing regret that the first appellant had refused the cheque for $9,300 despite a desire to have the sale completed. It was stated categorically in this letter that the respondent could not agree that the sale should be completed before obtaining approval for the extension of time to erect a building on the land referring obviously to the provision of the first agreement that the completion of the sale was subject to the approval of the extension of time.

On 23 July 1973, the first appellant through another solicitors, M/s Khong & Son, wrote to M/s Ng Ek Teong & Partners terminating the contract "as the sale was not completed as requested within one month as from 1 June 1973". M/s Khong & Son again wrote to M/s Ng Ek Teong & Partners on 29 August 1973 enquiring whether the contents of the earlier letter had been conveyed to the respondent.

On 9 September 1973, the first appellant entered into a sale and purchase agreement (the "second agreement") of the land with the second appellant. The purchase price of the land in the second agreement was $90,000 but the second appellant was to pay all arrears of quit rents, penalties and premiums or any other payments in respect of the land and was at liberty to deduct any such payments from the purchase price. Clause 7 of the second agreement provided that if the first appellant shall fail to institute and sign a memorandum of transfer of the land she shall refund to the second appellant the deposit of $5,000 together with all payments made to the government referred to which may have been made and shall in addition pay a sum of $5,000 as liquidated and ascertained damages for breach of contract.

On 27 September 1973, M/s Ng Ek Teong & Partners wrote to M/s Khong & Son enclosing a cheque for $74,000 being the balance of the purchase price under the first agreement. On 13 October 1973, another letter came from M/s Ng Ek Teong & Partners to M/s Khong & Son enclosing another cheque containing the correct balance of the purchase price since it was discovered that the earlier cheque for $9,300 had been refused by the first appellant. That letter also forwarded a memorandum of transfer in duplicate and also asked for a discharge of the charge. In other words, it would appear that the respondent was now willing to complete the sale despite the fact that the approval for the extension of time had not been obtained.

On 20 October 1973, M/s Jeyadeva & Zahir wrote to M/s Ng Ek Teong & Partners stating that they had not been discharged by the first appellant and that they were surprised that M/s Khong & Son were acting on their behalf. On the same date, M/s Jayadeva & Zahir wrote to M/s Khong & Son on the same matter. On 23 October 1973, M/s Khong & Son wrote to M/s Jayadeva & Zahir stating that they had been instructed by the first appellant in the matter. On 24 October 1973, M/s Ng Ek Teong & Partners wrote again to M/s Jayadeva & Zahir forwarding two cheques for $9,300 and $74,000 purporting to be the final payments of the land under the first agreement and also enclosed a memorandum of transfer for execution.

On 30 October 1973, M/s Jayadeva & Zahir wrote to M/s Ng Ek Teong & Partners stating that they were no longer acting for the first appellant but referred to the title deed which had been sent earlier to M/s Ng Ek Teong & Partners for the purpose of the application to the Ruler-in-Council and asked for the title deed to be returned. Another letter on the same date (30 October 1973) was sent for the personal attention of Mr. Selvarajah of M/s Ng Ek Teong & Partners asking for the return of the title deed. On 31 October 1973, M/s Jayadeva & Zahir wrote to M/s Ng Ek Teong & Partners returning the cheques for $9,300 and $74,400 and the two copies of Form 14A of the National Land Code and three copies of the Form under the Stamp Ordinance stating that they were no longer acting for the first appellant in the matter. This letter also again asked for the return of the title deed. In fact, another letter asking for the return of the title deed was also written on 7 November 1973 by M/s Jayadeva & Zahir and again on 13 November 1973.

On 14 November 1973, M/s Ng Ek Teong & Partners wrote to M/s Khong & Son asking the first appellant to reconsider her action terminating the first agreement and to accept the cheques. The letter also stated that if the first appellant failed to honour the first agreement the respondent would be filing legal proceedings for specific performance and damages.

On 15 November 1973, M/s Ng Ek Teong & Partners wrote to M/s Jayadeva & Zahir intimating for the first time that the Commissioner for Lands and Mines had informed them that approval had been granted for the extension of time.

There were also other developments. About a month after executing the second agreement, the second appellant on 13 October 1973 lodged a private caveat on the land. On 15 October 1973 Datuk Clough Thuraisingham, Raj & Co., acting for the second appellant, wrote to Dr. S. Thuraisingham, co-administrator of the estate of the chargee, forwarding a cheque for $38,910 and stating that upon payment of the capital and the interest, the title deed of the land should be handed to the second appellant. That letter also stated that there was a previous conversation between the second appellant and Dr. Thuraisingham followed by numerous telephone calls from the second appellant but he still could not get the title deed. On 20 October 1973, the second appellant wrote to the Registrar of Titles, Selangor stating that the capital and interest due of the charge had been sent through his solicitors to the co-administrator of the estate of the chargee. This letter also stated that the relevant documents of title are alleged to be misplaced and there is a possibility of indefinite delay in tracing the same and requested the Registrar to accept the presentation for registration subject to the discharge of the charge and also enclosed an application for removal of the private caveat dated 13 October 1973.

The second appellant was registered as the proprietor of the land on 13 March 1974. On 13 July 1974, the Registrar caused publication in the Gazette (Federal Gazette 2982) a notice of intention to issue a title in continuation under section 168 of the National Land Code. The ground given in the notice is that "the old grant has been lost". On the same date, a letter was received by the second appellant from the land office enclosing a copy of Form 10D and stating that a title in continuation would be issued shortly. On 22 August 1974, the original title and the Land Grant No. 15434 was cancelled and on the same date a title in continuation was issued to the second appellant.

The Assistant District Land Administrator (PW3) stated in evidence that if the original title of the land was produced to the land office while the land office was processing the second appellant's application, the land office would have informed the second appellant that his application for the title in continuation could not be entertained. This officer also stated that if the land office was made aware of the fact that at the time the old grant was cancelled the old grant was not lost, the land office would not have issued the new grant. This officer also stated that he could not produce the office file concerned as he was unable to trace it. So much for the background facts.

The gist of the particulars alleged in paragraph 13 of the reamended statement of claim was aptly summarized by Encik Thomas, counsel for the respondent, as follows:

13(a) Falsely and fraudulently representing to the Registrar of Titles that the issue document of title was lost, thereby *inducing the Registrar to issue a continuation title.*

13(b) Falsely and fraudulently representing to the Registrar that the personal representatives of the estate of the chargee could not be located, thereby *inducing the Registrar to cancel the memorial relating to the said charge* on the Registry document of title and thereafter to discharge the said charge on 5 December 1973.

13(c) Falsely and fraudulently representing to the Registrar that the issue document of title was lost, thereby *inducing him to dispense with the production of the said title when registering the transfer* from Ratnavale to Mahadevan on 13 March 1974.

13(d) Presenting the transfer from Ratnavale to Mahadevan for registration on 13 March 1974 with the intention to defraud Lourdenadin, such presentation being *made after they acquired knowledge that the Ruler-in-Council had extended the time for construction on the land.*

To bring home the allegation of fraud, it would appear that the respondent primarily relied on two letters written by the second appellant to the Registrar of Titles, Selangor and one statutory declaration. Since these are important documents, among other evidence, to determine whether the charge of fraud is proved, it is best that the relevant contents of the documents be reproduced.

(1) Letter dated 20 October 1973:

"20 Oktober 1973

Pendaftar Geran-geran Tanah,
Selangor,
Kuala Lumpur.

Dear Sir,

Grant for land No. 15434 Lot No. 9987 Mukim of Batu – Charge No. 13304 Volume CLXXVI folio 186 in favour of Sinnathamby s/o Kanthapillai dated 2 November 1967.

The capital and interest due has been sent through my solicitors Dato Clough Thuraisingham, Raj & Co., on 15 October 1973 to the co-administrator of the estate of the chargee.

The relevant documents of title are alleged to be misplaced and there is a possibility of indefinite delay in tracing the same.

Since I have already concluded the deal by advancing $50,000 I shall be much obliged if you will kindly accept my presentation for registration subject to the discharge of the above charge No. 13304 Volume CLXXVI folio 186.

I am enclosing an application for removal of private caveat 1789 dated 13 October 1973, together with the transfer deed duly stamped and a photostat copy of the solicitors' letter dated 15 October 1973, which is self-explanatory.

Yours faithfully,

Sgd.
Dr. M. Maha Devan, AMN, AMP."

(2) Letter dated 30 November 1973:

"30 November, 1973

Tuan Pendaftar Geran-geran Tanah,
Selangor,
Kuala Lumpur.

Tuan,

I am the purchaser of the abovementioned property. The chargee is now dead. I paid the full amount of loan together with interest to 31 October 1973 to the son of the chargee but he states that he has not in his possession the documents relating to the above land. Hence he is unable to accept the full sum in discharge.

I forward herewith my cheque for $32,650 made up as follows:

Capital borrowed	$25,000
Interest from 2 January 1971 to 31 October 1973 @ $225 per mensum	$7,650
	$32,650

Since the chargee is dead, I shall be much obliged if you will kindly register the discharge under section 279 of the National Land Code.

The fee of $10 is enclosed.

Sgd. Dr. M. Maha Devan"

(3) Statutory declaration dated 12 March 1974:

"Statutory Declaration

I, Dr. M. Maha Devan, NRIC No. 0673256 of No. 9, Jalan Hang Tuan, Ipoh, Perak, do solemnly and sincerely declare that the chargor Mr. K. Sinnathamy JP on land Title No. 15434, Lot 9987, Mukim of Batu has died on 17 February 1971. For proof of his death, I have forwarded a copy of the Certificate of Death No. A 024307 to the Registrar of Land Titles, Selangor including documents to cancel the charge.

I have made enquiries to obtain the documents of title of Geran No. 15434, Lot 9987, Mukim of Batu from the beneficiary of the late Mr. K. Sinnathamy JP but my attempts were unsuccessful and so I apply to obtain one continuation document of title, and I make this declaration to the best of my knowledge and in accordance with the provisions of the Statutory Declaration Act 1960.

Subscribed and solemnly declared)
by the above-named, Dr. M. Maha)
Devan at Kuala Lumpur in the)
State of Ederal Territory)
This 12th day of March 1974.)

Before me,"

Now what is the object of each of these documents? The first document relates to registration of the transfer subject to a discharge of the charge. The second document relates to the discharge of the charge on the land. The statutory declaration relates to an application by the second appellant for a title in continuation.

To get our perspective correct, it must be emphasized at once that the respondent, as plaintiff in the court below, challenged the indefeasibility of the second appellant's title, invoking section 340(2)(a) of the National Land Code. Section 340(2) of the Code provides that the title or interest of any person or body shall not be indefeasible (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy (b) or where the registration was obtained by forgery or insufficient or void instrument (c) where the title is unlawfully acquired. We are not presently concerned with paragraphs (b) and (c).

The onus is on the respondent as plaintiff to prove beyond reasonable doubt that there was a conspiracy to defraud between the first and second appellants. In the present case, the court must be satisfied that the circumstances in which the second appellant obtained the transfer or registration of his interest constituted not merely constructive or equitable fraud but actual fraud. The question is one of fact.

It would be sufficient for the purpose of section 340(2)(a) of the National Land Code for the respondent to prove that the title in the second agreement or the registration of the transfer was obtained by fraud or misrepresentation and that the second appellant was party or privy to the fraud or fraudulent misrepresentation. See also *Jasbir Kaur & Anor.* v. *Tharumber Singh*[1] and *Assets Co. Ltd.* v. *Mere Roihi.*[2]

In their statements of defence, both the first appellant and the second appellant denied any conspiracy to defraud or misrepresent and pleaded laches on the part of the respondent in prosecuting her claims.

The learned judge summarized the issues before her on the merits as follows:

(1) whether the repudiation by the first appellant of the contract was valid;

(2) if it was not valid, whether specific performance should be granted to the respondent;

(3) whether defence of laches applied to prevent the granting of specific performance;

(4) whether the allegation of fraud or misrepresentation have been proved; and

(5) what are the proper reliefs to be granted in the event the plaintiff succeeds against both defendants.

Let us now examine the conclusions of the learned judge on the issues as summarized by her.

On the first issue, we do not think there can be any difficulty in accepting the conclusion of the learned judge. Clause 3 of the first agreement stipulates that the completion date of the agreement was upon payment of the balance of the purchase price on 4 October 1972 *or* within 14 days of the Ruler-in-Council granting the extension of time, whichever is the later.

As there is no provision in the first agreement which empowers the first appellant to terminate the contract other than in the circumstances stipulated in clause 8, she was clearly in breach of the agreement by unilaterally imposing the condition that the respondent should complete the sale within one month from 1 June 1973. While appreciating her financial problems during the material period, we cannot, however, overlook the fact that her repudiation of the first agreement was contrary to the terms she had agreed to. We therefore agree with the learned judge that the purported termination of the first agreement by the first appellant on 23 July 1973 was bad.

We now come to the second and third issues. The question whether specific performance should be granted against the first appellant must be considered in the light of the surrounding circumstances.

The power of the court to grant specific performance is discretionary. The remedy of specific performance of any contract may at the discretion of the court be enforced and section 11(2) of our Specific Relief Act provides that unless and until the contrary is proved the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. Section 19 of the Act also provides that a contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it (as in this present case) as the amount to be paid in case of its breach.

Specific performance is an equitable relief which may be granted by the court to enforce against the defendant the duties and obligations which he had agreed by contract to perform. The remedy is special and extraordinary in its character; and the court has a discretion either to grant it or not. However, the discretion is not an arbitrary or capricious discretion but it is to be exercised on fixed principles. The conduct of the plaintiff such as delay or laches or breach on his part or some other circumstances outside the contract may render it inequitable to grant the remedy of specific performance.

Let us then look at some of the facts of the case. On the same date that the first agreement was executed, the solicitors for the first appellant authorized the solicitors for the respondent to apply on her behalf to the Ruler-in-Council for the extension of time to erect a building on the land. As a matter of law, it was the first appellant who should apply for the extension. But this was a mistake not of hers but the solicitors involved.

The title deed of the land was also forwarded on 2 October 1972 to the solicitors for the respondent for the purposes of securing the extension of time to build. Apparently, no action was taken by the solicitors for the respondent and no communication at all came from them until 25 May 1973.

They informed the solicitors of the first appellant that the application must be made by the first appellant herself and accordingly forwarded the application already prepared for the signature of the first appellant.

By this time, the first appellant was desperate and having failed to obtain an advance from the purchase price from the respondent she decided to give the one-month notice to terminate the agreement. The application for extension duly executed by the first respondent was also forwarded with the same letter giving the notice.

The respondent filed the writ dated 18 September 1974. It was not disputed between the parties that there was a delay of about 14 months before the respondent instituted legal proceedings against the first appellant.

It was submitted on behalf of the respondent by Encik Thomas that since under section 6(1)(a) and section 9(1) of our Limitation Act 1953 actions founded in contract and for the recovery of land must be brought within six years and 12 years respectively from the date of the cause of action accrued, a delay of 14 months would be immaterial.

We do not think we can agree with this submission. The Limitation Act is to determine the period after which the plaintiff should be barred from instituting a proceeding. But delay and laches are factors which have to be considered whether it would be proper for the court to exercise the discretionary power to grant the remedy of specific performance. Section 32 of the Limitation Act 1953 clearly provides that nothing in the Act shall affect any equitable jurisdiction to refuse relief on the grounds of acquiescence, laches or otherwise.

The doctrine of laches in the court of equity is not an arbitrary or a technical doctrine. The discretion is founded on the principle that there may be circumstances when it would be practically unjust to give a remedy of specific performance, for example either because the party has by his conduct done that which might fairly be regarded as a waiver or where by his conduct he has put the other party in a situation in which it would be unreasonable to place him if the remedy were afterwards to be asserted. In *Lindsay Petroleum Co.* v. *Hurd*[3] the doctrine was stated by Lord Selborne and he said:

"But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable.

Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

This statement was approved by Lord Blackburn in *Emile Erlanger & Ors.* v. *New Sombrero Phosphate Co. & Ors.*[4] at p. 1279.

In the instant case, there are also other factors to be considered besides the delay of 14 months in instituting the proceeding. Many events had taken place which clearly threatened the interest of the respondent in the first agreement. After receiving the letter with the notice on 1 June 1973, the respondent received a letter from the first appellant requesting for further payment of the purchase price on the grounds, *inter alia,* that she was in financial difficulties. The first appellant considered (albeit wrongly) that the approval by the Ruler-in-Council to extend time to build was a mere formality as far as the sale and purchase agreement was concerned. The respondent agreed with the attempt to vary the contract by offering $9,300 as further payment towards the purchase price and later to complete the sale before the approval by the Ruler-in-Council was obtained.

On 13 October 1973, the second appellant lodged a private caveat on the land. This caveat was, however, withdrawn on 20 October 1973. On 20 October 1973, the second appellant wrote a letter to the respondent and the Registrar of Titles.

Despite all these events and after a delay of nearly five years, the respondent lodged a private caveat only on 28 June 1978 and another private caveat on 18 August 1983. The fact that the solicitors for the respondent were in possession of the title deed during the material time was no excuse for not lodging the caveat to protect her interest in the light of events known to her to be taking place.

The learned judge considered the delay of 11 years from the filing of the writ to judgment and put the blame of the delay not only on the respondent but both the appellants as well.

In our view, for the present purpose, it is important to look at the delay of 14 months in insti-

tuting the proceeding after her interest was threatened and also the delay in lodging a caveat to protect her interest until after a lapse of about five years. A court of equity aids the vigilant, not the indolent.

The purpose of lodging a caveat is not so much as to give notice to the world but also, according to section 322(2) of the National Land Code, to prevent any dealings on the land. Had there been a caveat lodged by the respondent as soon as her interest was threatened, it was probable that the second agreement would not have been executed and the transfer to the second appellant could not have been effected in the registry of the land office.

The first appellant acted on the advice of her solicitors to execute the second agreement when she thought she had rightfully terminated the first agreement. The second appellant knew that the first agreement was terminated and following a search by his solicitors, Datuk Clough Thuraisingham, Raj & Co., in the land office registry he found no encumbrance on the title but there was a charge and quit rents and assessments had not been paid for five years and forfeiture proceedings were being instituted.

We are of the view that under the circumstances the case is not a fit and proper one for the grant of specific performance. As shown earlier, the respondent in fact agreed to vary the terms of the first agreement but the variation never took effect simply because they were not acceptable to the first appellant.

The respondent had not shown reasonable diligence in prosecuting her claims. There were the unexplained delay of 14 months in instituting proceedings after her interest was threatened and a further unexplained delay of five years before lodging a caveat on the land to protect her interest. The delay in instituting proceedings against the second appellant was even worse. He was added as a party only on 21 April 1982.

Now we come to the fourth issue, *i.e.* the allegation of fraud.

At this juncture, it may be useful to consider the point of procedure raised by both parties with regard to the calling of both the appellants as witnesses for the respondent after what Encik Thomas referred to as "conditional close of the plaintiff's case". On looking at the record, we notice that the respondent, as plaintiff in the court below, closed her case after the evidence of PW4. But Encik Thomas gave notice that in the event that the defendants should elect not to give evidence he would call them as witnesses for the plaintiff. Counsel for the first appellant then made the first appellant available to the plaintiff and the plaintiff then applied for leave to reopen her case. Counsel for the first appellant then (not Mr. Chelliah) did not object and the case was reopened and the first appellant became a witness for the plaintiff.

In her evidence, the first appellant denied any conspiracy to defraud. She admitted, however, that the second appellant spoke to her before writing the letter to the Registrar of Titles dated 20 October 1973 and the second letter to the Registrar of Titles dated 30 November 1973. She also said she knew about the statutory declaration made by the second appellant and gave him the authority to make the declaration. It was also in evidence that she said she sold the land to the second appellant after conferring with a lawyer and Mr. Selvarajah of M/s Ng Ek Teong & Partners and she was satisfied that it was in order for her to terminate the agreement. At the time when she transferred the property to the second appellant, there was no suit pending against her by the respondent. So much for the calling of the first appellant as witness for the plaintiff.

Encik Sri Ram for the second appellant in the court below indicated to the court then that the second appellant would not give any evidence but wished to rely solely on the submission that the plaintiff had not made out a case. Then the attempt by Encik Thomas to call the second appellant as witness for the plaintiff was met with vigorous objection by Encik Sri Ram. There were arguments about the propriety of calling the second appellant under the circumstances but the objection by Encik Sri Ram was overruled by the learned judge. The second appellant gave evidence but proved to be a difficult witness and Encik Thomas had to treat him as a "hostile" witness.

The cases cited on the calling of the opposite party as witness were ordinary civil cases – *Price* v. *Manning*[5] and *Barker* v. *Furlong*,[6] the standard of proof required being proof on the balance of probability.

There is no legal prohibition against a plaintiff calling a defendant to be his witness. The position in law is that the matter should be left to the discretion of the trial judge according to the circumstances of the case.

As a matter of practice, this is of course seldom done for the simple reason that when the defendant is called as a plaintiff's witness, his evidence is to be treated as the evidence of the plaintiff. Hence the plaintiff runs a risk every time he elects to take such a course of action.

In *Hughes* v. *Hill*[7] the exercise of a similar discretion was examined by the Supreme Court of South Australia. That was an action for negligence where a witness was called by the plaintiff's counsel to depose from his recollection of certain statements made in evidence at the coroner's inquest. Counsel deliberately abstained from putting in the depositions of the defendant at the inquest. The defendant counsel then submitted that there was no evidence of negligence. At the conclusion of his address, counsel for the plaintiff applied for leave to reopen her case to put in the depositions. Leave was refused. *Barker* v. *Furlong*[6] was applied. Cleland J. said:

"To decide otherwise would form an evil and dangerous precedent. To allow the present case to be reopened under the present circumstances would render it difficult to refuse any similar application in any subsequent case."

In the present case, the respondent had alleged fraud under section 340(2)(a) of the National Land Code and the standard of proof required is proof beyond reasonable doubt. See *Saminathan* v. *Pappa.*[8] For a proceeding of that nature, it would in our opinion be highly undesirable to allow the plaintiff to call the defendant after he has closed his case because his duty is to prove fraud beyond reasonable doubt against the defendant. In a case like this, we do not think it a good practice that a plaintiff should be allowed to supplement his case with the evidence of the defendant. It would indeed be a travesty of justice to allow the respondent after she had closed her case to call the second appellant to give evidence when the second appellant had elected not to give evidence but to rely on submission of no case.

Now we come to the question of the specific allegations of fraud. Since the appeal is also a rehearing, we feel disposed to consider the evidence afresh and to make the necessary inferences.

It is quite clear to us that there is no evidence of conspiracy and fraud to implicate the first appellant save for the evidence of family relationship with the second appellant which in our view is insufficient even to infer conspiracy to defraud. In fact, her own evidence as witness for the plaintiff negatived all the allegations against her.

As regards the second appellant, Raja Aziz based his submission on paragraph 13 of the reamended statement of claim. In fact, both he and Mr. Chelliah submitted that fraud had not been proved on the pleadings. Raja Aziz went a step further and submitted that since the second agreement was not challenged and no declaration has been made to render the second agreement void and of no effect the second agreement still stands as valid which confers the second appellant his interest on the land. According to Raja Aziz, under the circumstance, how and in what manner actions were taken by the second appellant to register his interest would be irrelevant.

We do not think we can agree with Raja Aziz that far. The interest of the second appellant was challenged under section 340(2)(a) in that his interest shall not be indefeasible in any case of fraud or misrepresentation to which he is privy or party. The words "in *any* case of fraud or misrepresentation" would seem to cover *every* case of fraud or misrepresentation to which the second appellant is shown to be party or privy. The fraud or misrepresentation may be at the point of the execution of the agreement or at the point of registration of the interest.

The case against the second appellant is substantially based on the three documents referred to earlier. To succeed, the respondent must show that the statements in these documents were false and were made fraudulently for the purpose of inducing the Registrar of Titles to act in the way he did.

As regards the allegation on paragraph 13(a) and (c) of the reamended statement of claim, nowhere is there any evidence to show that the second appellant represented to the Registrar that the original title was lost. The fact that the Gazette Notification cited that the original title was lost as a reason for a new title to be issued is not proof that the second appellant fraudulently and falsely misrepresented that the original title was lost when registration took place. The land officer stated in evidence that the office file could not be traced and that he could not enlighten the court on how the Registrar came to the conclusion that the original title was lost.

More importantly, the registration took place on 13 March 1974, *i.e.* about six months after the second agreement. The Gazette Notification stated that the ground for issuing the new title was

that the old title was lost was on 13 July 1974, that is, four months after registration had taken place. As stated earlier, the statutory declaration was for the purpose of obtaining a continuation title, not for registration. The question is simply whether either of the appellants before 13 March 1974, that is, the date of registration, at any time informed the Registrar of Titles that the title was lost. There is no evidence on this at all. The letter dated 20 October 1973 stated that the original title was misplaced and there would be a delay in tracing it. Even assuming that the second appellant knew about the numerous letters of M/s Jayadeva & Zahir asking for the return of the title deed which received no reply from the respondent's solicitors, to say there would be delay in tracing the title deed cannot in the circumstances be said to be a false statement.

Now the allegation in paragraph 13(b). The letter written by the second appellant to the Registrar of Titles on 30 November 1973 contained the following particulars:

(1) The second appellant was the purchaser of the property.

(2) The chargee is dead.

(3) The second appellant had paid the full amount of the loan together with the interest to the son of the chargee but he stated that he was not in possession of the document of title; and hence unable to accept the sum in deposit.

None of these particulars can be said to be false. In fact, there is evidence to show that the second appellant had attempted to pay the full sum for the discharge to Dr. Thuraisingham. In any case, what the second appellant did was not inconsistent with section 279 of the National Land Code. That section enables a chargor to apply to the Registrar for discharge under that section where the chargee (or the personal representative of the chargee) was unable to accept the full payment for discharge.

Finally paragraph 13(d). Presenting the transfer for registration under the circumstances cannot be construed as an act with intention to defraud the respondent. Even if the second appellant had knowledge of the approval of the extension of time by the Ruler-in-Council, the approval for extension was not in the name of the respondent but in the name of the first appellant from whom he had purchased the land. In any case, mere knowledge is not fraud. There must be shown dishonesty of some sort. See *Chellapah Sethupathy* v. *Aziz Beg.*[9] Accordingly, we are also of the opinion that paragraph 13(d) of the reamended statement of claim had not been proved.

The principle involved here is simple but established. The respondent must be held bound by her pleadings. The particulars set out in paragraph 13 of the reamended statement of claim are part of the pleadings. The effect of the particulars is that the issues of fraud to be tried by the court are circumscribed by the particulars. See *Yorkshire Provident Life Assurance Co.* v. *Gilbert & Rivington.*[10] The learned judge was bound to decide the charge of fraud solely upon the particulars set out in the reamended statement of claim. See also *Abdool Hoosein* v. *Turner.*[11]

We are not satisfied that fraud under section 340(2)(a) of the National Land Code has been proved beyond reasonable doubt by reference to any of the particulars set out in paragraph 13 of the reamended statement of claim. Suspicion, however grave, is not proof for the purpose of a proceeding under the said provision of the National Land Code.

Our orders in this appeal are therefore as follows:

(1) The appeal by the second appellant is allowed with costs here and below and orders made by the learned judge in respect of the second appellant are set aside.

(2) The appeal by the first appellant is allowed to the extent that the order for specific performance granted by the learned judge is set aside.

The order as to damages of $9,300 as set out in sub-paragraph (2) of the judgment of the learned judge is affirmed.

The first appellant shall be entitled to only half costs of the appeal.

(3) The order of the learned judge dismissing the counterclaims of both the first appellant and the second appellant with costs is affirmed.

Order accordingly.

Solicitors: *Sri Ram Zulkifly & Kumar; Skrine & Co.; Manjit Singh Sachdev & Co.*